

ARKANSAS SUPREME COURT

No. CR 06-159

NOT DESIGNATED FOR PUBLICATION

RODNEY HOLLY
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered April 27, 2006

PRO SE MOTION FOR APPOINTMENT OF
COUNSEL [CIRCUIT COURT OF GARLAND
COUNTY, CR 2000-367-I, HON. JOHN HOMER
WRIGHT, JUDGE]

APPEAL DISMISSED; MOTION MOOT

PER CURIAM

A judgment and commitment order entered December 17, 2001, and an amended judgment and commitment order entered January 11, 2002, both reflect that appellant Rodney Holly entered guilty pleas to first-degree murder and aggravated robbery. Appellant was sentenced to 240 months' imprisonment on the murder charge and 480 months' imprisonment on the aggravated robbery charge, with the sentences to run consecutively for a total time to be served of 720 months. On October 19, 2005, appellant filed in Garland County Circuit Court a *pro se* motion requesting scientific testing under Act 1780 of the 2001 Acts of Arkansas, codified as Ark. Code Ann. § 16-112-201 – 16-112-207 (Repl. 2006). The motion was denied by order entered October 20, 2005, and appellant has lodged his appeal of that order in this court. Now before us is appellant's *pro se* motion for appointment of counsel.

Postconviction matters are considered civil in nature with respect to the right to counsel; there is no absolute right to appointment of counsel in civil matters. *See Virgin v. Lockhart*, 288 Ark. 92, 702 S.W.2d 9 (1986)(*per curiam*). Nevertheless, this court has held that if an appellant makes a substantial showing that he is entitled to relief in a postconviction appeal and that he cannot proceed without counsel, we will appoint counsel. *See Howard v. Lockhart*, 300 Ark. 144, 777 S.W.2d 223 (1989)(*per curiam*). Not only has appellant failed to make such a showing, it is clear

that appellant cannot prevail on his claims.

This court has consistently held that an appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Booth v. State*, 353 Ark. 119, 110 S.W.3d 759 (2003) (*per curiam*); *Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (*per curiam*); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (*per curiam*); *Harris v. State*, 318 Ark. 599, 887 S.W.2d 514 (1994) (*per curiam*); *Reed v. State*, 317 Ark. 286, 878 S.W.2d 376 (1994) (*per curiam*). Because it is clear from appellant's claims that he could not prevail, we must dismiss the appeal, and the motion is therefore moot.

Act 1780 of the 2001 Acts of Arkansas was amended by Act 2250 of 2005. As revised, Section 16-112-202(7) provides that a person may make a motion for fingerprinting or other testing if the identity of the perpetrator was at issue during the investigation or prosecution of the offense being challenged. Here, appellant entered guilty pleas to the charges, and he made no showing in his motion that identity was at issue during the investigation. In his motion in the trial court, it appears that appellant only attempted to challenge the plea by alleging misconduct by the prosecution. Any challenge to the guilty plea should have been raised in a timely petition under Ark. R. Crim. P. 37.1, and Act 1780 does not provide a substitute for that remedy. *See Graham v. State*, 358 Ark. 296, ___ S.W.3d ___ (2004) (*per curiam*).

Moreover, appellant's motion was filed more than thirty-six months after the date of his conviction. Under Section 16-112-202(10), a motion for relief must be timely filed. As to those motions not filed within thirty-six months of the date of conviction, the movant must rebut a presumption against timeliness through a showing of one of the following: (1) incompetence contributing to the delay; (2) that the evidence to be tested was newly discovered; (3) that the motion is not based solely upon the movant's assertion of innocence and a denial would result in manifest injustice; (4) that a new method of technology that is substantially more probative than prior testing is available; (4) that other good cause exists. Appellant did not allege he was not competent at any time. The evidence that appellant requested to be tested was the gun mentioned in the information,

and he requested testing for fingerprints, without alleging that any new technology had been developed. Appellant's motion failed to include any showing so as to rebut the presumption that it was untimely. Because it is clear that appellant could not prevail, we dismiss the appeal and appellant's motion for counsel is therefore moot.

Appeal dismissed; motion moot.